Supreme Court, U.S.
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85-1828

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DANIEL RHOADES,

Petitioner,

— against —

ACLI GOVERNMENT SECURITIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DANIEL RHOADES
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60pp

QUESTIONS PRESENTED FOR REVIEW

The United States Court of Appeals for the Second Circuit affirmed an order of the District Court for the Southern District of New York which stayed petitioner's pending state court action for a civil forfeiture under New York Judiciary Law, Section 487. The state court action was brought against the law firm of Curtis, Mallet-Prevost Colt & Mosle (the attorneys for Respondent "AGS").

The gravamen of the New York court action is that these attorneys were guilty of misconduct that included the making of deliberate false statements which misled their adversaries, and the Federal District and Second Circuit courts.

The Court of Appeals' decision presents the following question:

Does a New York statutory action brought against attorneys to recover civil penalties from them because they knowingly and deliberately sought to deceive the District and Second Circuit Federal Court and the parties to an action, constitute a threat to the judgment or jurisdiction of a Federal Court sufficient to support a federal stay of the state court action, despite the fact that there is a general prohibition against such stays in 28 U.S.C. Section 2283, and the fact that the New York statutory action serves to protect the New York State public interest?

PARTIES TO THE ACTION

Petitioner DANIEL RHOADES, the defendant below, is an individual residing in New York.

Respondent ACLI GOVERNMENT SECURITIES INC. ("AGS") the plaintiff below, was incorporated in Illinois, to serve as a division of a New York corporation.

CURTIS, MALLET-PREVOST COLT & MOSLE ("Curtis, Mallet"), the New York law firm that was the attorney for plaintiff-respondent AGS, is not a party herein. It is the defendant in the pending New York action which has been stayed, and is, in substance, the real party in interest.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

DANIEL RHOADES,

Petitioner,

-against-

ACLI GOVERNMENT SECURITIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner DANIEL RHOADES ("Rhoades") respectfully petitions that a writ of certiorari issue to review the judgment of the United States Circuit Court of

Appeals for the Second Circuit entered on February 6, 1986, on the ground that this case presents a question of the interpretation of 28 U.S.C. Section 2283 and an issue of substantial importance to comity and relations between state and federal courts which has never been considered by this Court.

OPINIONS BELOW

The United States Court of Appeals filed an affirmance without opinion, (reproduced at App. p. A-1), "for the reasons given" by the District Court judge in his opinion.

The opinion of the District Court is set forth in an "endorsement" dated July 23, 1985, on which an order was settled and signed August 7, 1985, (reproduced at App. pp. A-5 and A-3, respectively).

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals was entered on February 6, 1986. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. 1245 (1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 2283: A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. Section 1332: (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between--

(1) citizens of different States; ....

(c) For the purposes of this section

and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business; ....

New York State Judiciary Law Section 487

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,

2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

STATEMENT OF THE FACTS

Petitioner Rhoades sought to purchase certain government bonds from respondent AGS, for himself and for Milton Braten. This was done by telephone orders from New York to Chicago. He paid over one million dollars on account for them. However, no attempt was made to deliver any bonds until after a dispute arose. AGS tendered bonds only after the market price of the bonds had fallen.

AGS then sued Rhoades and Braten in the United States District Court for the Southern District of New York for damages. Jurisdiction was based on alleged diversity of citizenship. Rhoades acted as his own trial counsel. Braten had independent counsel.

Before the trial, Curtis, Mallet's trial counsel ("Lauer") represented to defendants' counsel that AGS had "its

principal office" in Chicago and that therefore diversity jurisdiction existed. He obtained their stipulation to this effect as part of the proposed pretrial order.

Lauer knew full well that 28 U.S.C. 1332(c) provides that a corporation is deemed a citizen of the state of its "principal place of business", not the state of "its principal office" (Complaint par. 47) (A-21). The distinction between the two is clear and may be crucial.

Nevertheless, at the trial, Lauer falsely stated to the Court and jury that he was reading from the stipulation, that it stated that AGS had "its principal place of business in Chicago", (Complaint par.62) (A-25) and therefore the Court had diversity jurisdiction, (ibid.).

Lauer knew this was a false and

misleading statement, (Complaint par. 65). He made it with the intention of misleading the Court and the parties, and he succeeded in doing so, (Complaint par. 65 to 69) (A-25-26).

Thereafter the jury rendered its verdict for AGS. Judgment was entered thereon. The judgment was affirmed on appeal.

After the federal trial and verdict, Rhoades moved to set aside the judgment because diversity jurisdiction was lacking. In connection with this post-trial motion, Curtis, Mallet further falsely stated that AGS had its sole office in Chicago, and that only two persons employed by AGS had worked in New York. These were additional false statements. (Complaint pars. 86 to 89, and 97) (A-28, A-29, A-30).

The District Court thereupon denied the motion (A-10).

Subsequently, Rhoades instituted an action in the New York State Supreme Court, not against AGS, but against Curtis, Mallet under New York Judiciary Law, Section 487. In that action he claimed punitive damages based on these egregious frauds committed by these attorneys.

Curtis, Mallet thereupon moved the District Court in this action, ostensibly on behalf of the plaintiff, but in fact on their own behalf, for an order staying the pending New York action against them, and any similar actions or proceedings.

The District Court judge granted Curtis, Mallet's motion. In his endorsement opinion, dated July 23, 1985 he stated that the filing of the state court litigation constituted a direct challenge to the jurisdiction of the district court and to its ability to

effect or protect its judgments within the meaning of 28 U.S.C. Section 2283 (App. A-8).

The Second Circuit Court of Appeals affirmed, in a memorandum, "substantially for the reasons given by Judge Lasker in his endorsement opinion".(A-2)

REASONS FOR GRANTING THE WRIT

I.

THE STAY OF RHOADES' ACTION IN THE NEW YORK SUPREME COURT VIOLATES THE ANTI-INJUNCTION STATUTE.

The pending state court action by Rhoades against Curtis, Mallet seeks to recover punitive damages imposed by New York statute to punish intentional misconduct by Curtis, Mallet, including false statements these lawyers made to the court and the parties. The New York law allows actions for such punitive damages in aid of the public policy of New York to discourage wrongful conduct

by the defendants and as a warning to others.

The rationale of punitive damages has been clearly set forth by the New York Court of Appeals in Garrity v. Lyle Stuart, Inc. 40 N.Y.2d 354 (1976), at p. 358:

> "'Punitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant, but to deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future' It is a social exemplary 'remedy', not a private compensatory remedy."

The New York State action in no way challenges the judgment of the District Court, or questions its jurisdiction. This is obvious, because the New York Judiciary Law is not concerned with the success or failure of the attorney's attempt to deceive.

The cause of action for treble

damages was not created as a private compensatory remedy for injured parties like Rhoades, but as a social exemplary remedy to deter both Curtis, Mallet and other members of the bar from indulging in similar misconduct.

Thus, in a disciplinary proceeding, Matter of Von Weigen, 63 N.Y.2d 163 (1984), the New York Court of Appeals considered the case of an attorney who had sent out letters soliciting clients, which "when interpreted in a commonsense manner" were misleading. The attorney urged in his defense that there was no proof anyone either read them or acted upon them.

The Court of Appeals held that it was not a defense that the lawyer's wrongdoing had no effect, citing this Court's decision in Ohralik v. Ohio State Bar Ass'n 436 U.S. 447 (1978),

and saying:

"There was no need to establish that the letters actually mislead the recipients. It is the potential for deception which is significant."

This Court has applied the same principle in Hazel-Atlas Glass Co. v. Hartford Empire Co. 322 U.S.238 (1944). There, defendant opposed reopening a judgment in its favor obtained by its having submitted in evidence a magazine article "planted" as a publication by a famous "impartial" expert who in fact had been paid by defendant for signing it. This Court rejected defendant's argument that the prior judgment was correct, irrespective of the fraudulent attribution. The Court's opinion stated:

(Defendant's lawyers) "are in no position now to dispute its effectiveness. Neither should they now be permitted to escape the consequences of Hartford's attribution of authorship to

> Clarke on the ground that what the article stated was true. . . . The article, even if true, should have stood or fallen under the only title it could honestly have been given . . .", 322 U.S. at 247.

Similarly, the pending New York action under Judiciary Law Section 487 will stand or fall upon proof of the attorneys' willful and deliberate fraud, regardless of whether the fraud was successful. It is thus perfectly clear that the pending New York action against Curtis, Mallet is not concerned with the outcome of the AGS judgment. Similarly, the Federal Courts are not concerned with the outcome of Rhoades' state court action.

Therefore, the stay of the New York action violates the statutory prohibition of such stays contained in Title 28 U.S.C. Section 2283.

II

THIS COURT SHOULD CLARIFY ITS POLICY TO DEFER TO THE STATES' EFFORTS TO MAINTAIN THE INTEGRITY OF THE BAR

Assuming arguendo, that the pending state action under New York Judiciary Law section 487 somehow prevents proper effectuation of the District Court judgment, it does not follow that 28 U.S.C. section 2283 requires that the federal courts must stay or interfere in any way with such a state court action.

Section 2283 first prohibits generally a stay of proceedings in a State court, and then makes an exception to this prohibition where necessary to protect or effectuate the federal court judgment.

In such circumstances the statutory "may not" addressed to the federal court is turned into "may".

Assuming arguendo that under the statute the federal court "may" enjoin a state court proceeding, the question remains, should it do so?

Here, as pointed out above, the pending state court proceeding is for "a social exemplary remedy", not a private one, Garrity v. Lyle Stuart, Inc. 40 N.Y.2d 354 (1976). Its purpose, which is to maintain standards of the legal profession, is one for which the States bear "a special responsibility", and in which their interest is "particularly strong" Ohralik v. Ohio State Bar Ass'n (supra) 436 U.S. at 461.

"The interests of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have

historically been officers of the courts." Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

The question of whether a federal court should thus exercise the injunctive power in conflict with the State interest, is one of great importance to proper federal - state judicial comity. Here, it involves a question of the interpretation of, and interplay between, 28 U.S.C. Section 2283, and New York Judiciary Law Section 487.

The decisions herein of the courts below have entirely disregarded the New York Judiciary Law social exemplary remedy, and its function in carrying out the New York courts' "special responsibility" to maintain the standards of the legal profession.

Instead, the decisions below rest

upon a non-existent threat to the judgment and jurisdiction of the District Court.

It is most appropriate that this Court settle this important question, set aside the erroneous stay applied by the District Court, and provide guidelines for the essential state-federal judicial comity which federal as well as state courts should respect.

CONCLUSION

For the above reasons I respectfully pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

DANIEL RHOADES
Petitioner, pro se
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APPENDIX

Order of the Second Circuit

Filed Feb. 6, 1986, 85-7780

UNITED STATES COURT of APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of February, one thousand nine hundred and eighty-six.

Present:

HONORABLE Wilfred Feinberg,
Chief Judge.
HONORABLE Ellsworth A. Van Graafeiland,
Circuit Judge.
HONORABLE Richard J. Cardamone
Circuit Judge.

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ACLI GOVERNMENT SECURITIES, INC.,

Plaintiff-Appellee,

-against-

DANIEL RHOADES,

Defendant-Appellant.

----------x

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by appellant pro se and by counsel for appellee.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED substantially for the reasons given by Judge Lasker in his endorsement opinion dated July 23, 1985. Appellee's request that we impose double costs and attorneys fees on appellant is denied.

/s/ Wilfred Feinberg
Wilfred Feinberg, U.S.C.J.

/s/ Ellsworth A. Van Graafeiland
Ellsworth A. Van Graafeiland, U.S.C.J.

/s/ Richard J. Cardamore
Richard J. Cardamore, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

ORDER OF THE DISTRICT COURT

Filed Sept. 5, 1985, 81 Civ. 2555 (MEL)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ACLI GOVERNMENT SECURITIES, INC.,

Plaintiff,

-against-

DANIEL RHOADES and MILTON BRATEN,

Defendants.

----------x

WHEREAS, plaintiff ACLI Government Securities, Inc. ("AGS") has moved (1) pursuant to 28 U.S.C. Section 2283 for an order staying a proceeding brought by defendant Daniel Rhoades ("Rhoades") in the Supreme Court of the State of New York which collaterally challenges the validity of the Judgment herein, and enjoining defendants from initiating

any further such actions, and (2) pursuant to 28 U.S.C. Section 1927 requiring that Rhoades satisfy personally the costs, expenses, and attorneys' fees incurred by AGS as the result of Rhoades' multiplication of proceedings in connection with this action; and,

WHEREAS due consideration has been given by the Court and just cause appears as set forth in the Court's Endorsement dated July 23, 1985;

NOW, THEREFORE, it is

ORDERED that the action entitled Daniel Rhoades v. Curtis, Mallet-Prevost, Colt & Mosle, Index No. 15999/84, pending in the Supreme Court of the State of New York, County of New York, and at present on appeal to the Appellate Division, First Department, be and hereby is permanently stayed pursuant to 28 U.S.C. Section 2283;

and, it is further

ORDERED that Rhoades be and hereby is permanently enjoined and restrained from initiating any action or proceeding in any court which in any way challenges the validity of the Judgment herein; and, it is further

ORDERED that AGS's motion for the imposition of sanctions pursuant to 28 U.S.C. Section 1927 is denied.

Dated: New York, New York

August 7, 1985

/s/ Morris E. Lasker
Morris E. Lasker
United States District Judge

ENDORSEMENT

ACLI GOVERNMENT SECURITIES, INC. Plaintiff v. DANIEL RHOADES and MILTON BRATEN, Defendants. 81 Civ. 2555(MEL)

LASKER, D.J. Plaintiff's cross-motion pursuant to 28 U.S.C. Section 2283 for an injunction staying proceedings originally brought by the defendant Daniel Rhoades in the Supreme Court of

the State of New York, and now pending in the Appellate Division, First Department, which collaterally challenges the validity of the judgment herein, and restraining defendants from initiating any further such action is granted to the extent of enjoining Daniel Rhoades from such action.

Plaintiff's cross-motion for sanctions pursuant to 28 U.S.C. Section 1927 is denied, subject to renewal in the event of any action on the part of Daniel Rhoades in violation of the injunction referred to above.

After this court denied Rhoades' initial post-trial motion to set aside the judgment, he filed an additional motion attacking the judgment on the grounds that diversity of jurisdiction did not exist. He claimed AGS' principal place of business was New York. By order of October 13, 1983,

this court denied the motion. Rhoades appealed and the Court of Appeals for the Second Circuit affirmed by order of March 9, 1984, stating that there was"... substantial evidence in the record reflecting ACLI's contacts with the State of Illinois ...". Rhoades also filed a separate motion de novo in the Second Circuit alleging subject matter jurisdiction. The motion was denied.

Thereafter, on July 13, 1984 Rhoades served the complaint in the State action upon AGS' counsel, Curtis, Mallet-Prevost, Colt & Mosle (hereinafter "Curtis"), alleging that Curtis violated Section 487 of the New York Judiciary Law and asking for damages in the amount of $9,975,660. The complaint alleges that subject matter jurisdiction of the instant Federal action was founded on

fraudulent statements made by Curtis in pleadings and in open court. In view of the findings of this court and the Court of Appeals on the several occasions in which the matter has been presented to them, the filing of the state litigation constituted a direct challenge to the jurisdiction of this court and to its ability "to protect or effectuate its judgments" within the meaning of Title 28 U.S.C. Section 2283. The fact that the complaint was dismissed by the Supreme Court of the State of New York on October 27, 1984 does not render the matter moot because Rhoades has appealed from that decision. Accordingly, injunctive relief is appropriate to effectuate and protect the judgments of this court.

The application for the assessment of attorneys' fees and costs against Rhoades is denied. Giving him the

benefit of the doubt it is barely possible to discern that Rhoades sincerely believed that, in instituting the state action he was pursuing remedies which legitimately remained open to him. Accordingly, a penalty under 28 U.S.C. Section 1927 would be inappropriate at this time. However, any further action on his part would be upon notice, set forth in this Endorsement that such behavior would constitute a multiplication of proceedings unreasonably and vexatiously increasing costs within the meaning of 28 U.S.C. Section 1927 and would warrant the imposition of sanctions.

Submit proposed decree on notice.

Dated: New York, New York
July 23, 1985

Morris E. Lasker
U.S.D.J.

ENDORSEMENT

ACLI GOVERNMENT SECURITIES, INC., Plaintiff v. DANIEL RHOADES and MILTON BRATEN, Defendants. 81 Civ. 2555 (MEL)

LASKER, D.J. In this post-trial, post-judgment motion Daniel Rhoades moves the court to dismiss the complaint on the ground that the alleged diversity jurisdiction does not exist or, in the alternative, to stay enforcement of the judgment pending discovery to establish whether diversity jurisdiction does exist. The motion is denied.

Aside from the fact that the joint pre-trial order in this action dated May 18, 1982, specifically stipulates that the plaintiff's principal office is located in Chicago and that the action is a controversy between citizens of different states, the affidavit of Daniel R. Lenihan in opposition to the motion establishes that the plaintiff's Chicago location

is its "nerve center" and that Chicago is the place where the plaintiff has "its most extensive contacts with, or greatest impact on, the general public." R.G. Barry Corp. v. Mushroom Makers, Inc., 612 F.2d 651, 655 (2d Cir. 1979). Under the rulings of the Court of Appeals of this Circuit, these factors are the criteria for determining where a corporate party maintains its principal place of business and of what state it is a "citizen" within the meaning of Article III of the Constitution and of 28 U.S.C. Section 1332.

The fact that the plaintiff's parent corporation is located in White Plains and that two of the plaintiff's traders and officers have at times operated from the parent office in White Plains, is insufficient either to confer New York citizenship upon the

plaintiff or deprive it of Illinois citizenship.

The motion is denied.

It is so ordered.

Dated: New York, New York

October 13, 1983

Morris E. Lasker
U.S.D.J.

AMENDED COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

DANIEL RHOADES,

Plaintiff,

-against-

CURTIS, MALLET-PREVOST, COLT & MOSLE,

Defendants.

----------x

Plaintiff, pro se, for his amended complaint against the defendants, alleges:

1. Plaintiff is a citizen of the State of New York.

2. The defendants herein (col-

lectively referred to as "CMP"), are a partnership including lawyers practicing law in the State of New York, and all of its partners.

3. By 1962, CMP knew Adrian C. Israel controlled an enterprise entity ("ACLI").

4. By 1962, CMP knew that ACLI's principal place of business was in New York.

5. At all time thereafter, CMP was familiar with ACLI's business and dealings.

6. By 1980, CMP knew that ACLI then included a number of "divisions".

7. CMP knew that one of these "divisions" operated under the name of ACLI Government Securities, Inc. ("AGS"), a corporation qualified to do business in New York.

8. CMP knew that without agreements therefor, ACLI personnel made deci-

sions for AGS; that ACLI used its facilities for AGS; and that ACLI used money from AGS.

9. In 1980, plaintiff was doing business with ACLI.

10. In 1980, plaintiff gave, and AGS accepted, "cash" purchase orders specifying quantities, maturities and rates of interest, totaling $13,000,000 face amount of bonds.

11. Plaintiff gave more than half of these purchase orders for his own account.

12. Plaintiff gave the rest of these purchase orders as an attorney-in-fact acting for the account of Milton Braten ("Braten"), who is a citizen of New York.

13. AGS agreed with plaintiff that AGS would have the bonds specified in the "cash" purchase orders, at the time of AGS's "cash" sale thereof pursuant

to the orders.

14. AGS further agreed with plaintiff that commencing at the time of AGS's "cash" sale of these bonds, AGS would "finance" AGS's "cash" sale of these bonds.

15. AGS further agreed with plaintiff that these bonds, and the coupon interest which would accrue thereon, would belong to the purchaser specified in the aforesaid "cash" purchase orders, immediately, from the time of AGS's "cash" sale thereof.

16. AGS further agreed to "carry" said bonds on terms agreed to by AGS.

17. AGS breached each of these agreements.

18. AGS represented to plaintiff that AGS would have the bonds specified in the "cash" purchase orders, at the time of AGS's "cash" sale thereof pursuant to said orders.

19. AGS represented to plaintiff beginning in 1980, and until April 1981, that AGS was "carrying" for plantiff, the bonds specified in the aforesaid purchase orders.

20. AGS respresented to plaintiff beginning in 1980 and until April 1981, that coupon interest was accruing to plaintiff on the bonds specified as aforesaid.

21. AGS represented to plaintiff that AGS was receiving and crediting to plaintiff during said period of time, the said coupon interest on the said bonds.

22. Each of said representations made by ACLI was false.

23. In 1980, plaintiff sent AGS over $900,000 in cash and bonds, and caused a third party to send ACLI $300,000, pursuant to the aforesaid purchase orders.

24. Plaintiff demanded that AGS deliver specified bonds to plaintiff therefor.

25. AGS then represented that it was holding the specified bonds as "margin".

26. ACLI's said representation was false.

27. Plaintiff then cancelled and rescinded the aforesaid "cash" purchase orders.

28. Plaintiff then cancelled and rescinded the aforesaid "finance" agreements.

29. In April 1981, AGS attempted to deliver bonds to plaintiff.

30. The bonds AGS attempted to deliver were not the bonds specified in the aforesaid "cash" purchase orders.

31. Delivery of said bonds would not comply with AGS's agreement.

32. If the bonds which AGS acquired

in 1981, and attempted to deliver in 1981, had been accepted in 1981, resale thereof would not give the same tax consequences as resale of bonds bought, owned and held from the time of the 1980 "cash" orders.

33. Plaintiff did not receive back any of the bonds or money plaintiff sent AGS.

34. Plaintiff was entitled to have the foregoing facts submitted for adjudication after a full and fair hearing in a court of competent jurisdiction.

35. Plaintiff told CMP in April 1981 that plaintiff intended to sue AGS.

36. CMP thereupon filed an AGS action (the "action") against plaintiff herein for $1,285,784.27 plus interest, and against Braten for $533,930.81 plus interest, in the United States District Court for the Southern District of New

York.

37. The Federal district courts have limited jurisdiction, including jurisdiction over actions where there is diversity of citizenship because the principal place of business of a corporation gives it a citizenship diverse from that of the other parties.

38. CMP alleged in the complaint in the action that the defendants named therein are residents of New York, that AGS has its principal place of business in Illinois, and that the controversy alleged is between citizens of different states.

39. Plaintiff herein and Braten both denied knowledge or information sufficient to form a belief as to the AGS's aforesaid allegations as to its principal place of business, and as to whether the controversy it alleged is between citizens of different states.

40. Public policy limits diversity of citizenship litigation in Federal courts.

41. The Supreme Court of the United States and other Federal courts have held that subject matter jurisdiction based on diversity of citizenship cannot be created in Federal courts by inaction, waiver, consent, concession, stipulation or estoppel.

42. The Federal district court was powerless to hear the action unless there was diversity of citizenship of the parties to the action.

43. A finding of diversity of citizenship involved decision of a fact question whether AGS is, as alleged, a corporation with its principal place of business in Illinois.

44. The Supreme Court of the United States and other Federal courts have held that there is a presumption

against diversity of citizenship jurisdiction.

45. The Supreme Court of the United States and other Federal courts have held that the party asserting the existence of Federal court diversity of citizenship jurisdiction has the burden of proof and the burden of persuasion.

46. CMP knew that the facts it could submit in the action were insufficient to prove that AGS's principal place of business was not in New York.

47. CMP knew that a mere stipulation that the Federal court has diversity of citizenship jurisdiction, without stipulating as a fact that AGS's principal place of business is not in New York, would not give jurisdiction to the Federal court.

48. In May 1982, CMP made representations to adversary counsel in the action by which it procured

signature of a stipulation as part of a proposed "joint pre-trial order", and "for purposes of trial...only", that AGS had "its principal office in Chicago, Illinois", and that the Federal court has subject matter jurisdiction of the action because "the controversy is between citizens of different states".

49. Federal courts have stated the following as to the use of the phrase "principal place of business" in the statute limiting Federal court jurisdiction:

(a) "It is worth noting that the term 'principal place of business' does not mean 'principal office"';

(b) "the place where the principal office is located is not necessarily the place where the principal business is carried on. Such may or may not be the case. Nor as between the place

where a...corporation's actual operations are carried on and the place where the selling is done and the principal office maintained can the latter be declared in all cases, as a matter of law, the principal place of business.... Each case depends upon its own special circumstances.";

(c) "Moreover, an allegation that a corporation's home office is located in a certain state is not equivalent to a declaration that its principal place of business is situated in that state".

50. Plaintiff herein has found no evidence that the proposed "pre-trial order" was ever signed, or that it or the aforesaid stipulation contained in it was ever filed.

51. Plaintiff was ill and had a cancer operation in 1982.

52. By reason thereof, trial of the action was delayed until 1983.

53. In the early part of 1983, plaintiff herein underwent two further operations.

54. CMP opposed any further delay of the trial of the action.

55. Plaintiff herein then learned in 1983 that his counsel in tne action had failed to make necessary investigations as to the facts, and was not prepared for trial.

56. Plaintiff herein then learned in 1983 that counsel who plaintiff herein had substituted for his prior counsel in the action, did not have time to prepare for trial.

57. Plaintiff herein was then compelled to go to trial as his own attorney.

58. Plaintiff herein was inexperienced in Federal court litigation.

59. CMP knew that plaintiff herein

was inexperienced in such litigation.

60. Plaintiff herein was ill and in pain during the trial of the action.

61. CMP knew plaintiff herein was ill and in pain during said trial.

62. At said trial, CMP, through its partner Eliot Lauer, made a statement in the presence of the Court, the jury, the parties including plaintiff herein, and counsel for Braten in the action, that he was "Reading from Stipulated Facts" that AGS "was a dealer and market maker in government securities with its principal place of business in Chicago, Illinois." and that "This Court has subject matter jurisdiction"."

63. There never was a stipulation as to AGS's "principal place of business."

64. CMP's aforesaid statement, made at the trial of the action, was false.

65. CMP knew when it made said statement, that there never was a

stipulation as to AGS's "principal place of business."

66. CMP made said statement with intent to deceive the Court.

67. CMP made said statement with intent to deceive the parties defending the action, including the plaintiff herein.

68. CMP, by making said statement, deceived the Court.

69. CMP, by making said statement, deceived the parties in the action, including the plaintiff herein.

70. No person hearing the statement made by CMP had signed any stipulation.

71. Each person hearing what CMP said, believed what CMP said.

72. Each person hearing what CMP said, relied on what CMP said.

73. Each person hearing what CMP said, assumed that persons not present at the trial had signed the stipulation

that CMP stated had been signed.

74. CMP, by making said statement, was guilty of a deceit.

75. But for said deceit, there was nothing in the action that proved jurisdiction.

76. But for said deceit, the action should have been dismissed for lack of subject matter jurisdiction, and would have had to be dismissed in any event on appeal.

77. But for said deceit, plaintiff herein would have been able to have a full and fair trial in a court of competent jurisdiction.

78. Plaintiff herein is a lawyer admitted to practice in New York.

79. Plaintiff herein is experienced in New York State court litigation.

80. But for CMP's deceit, plaintiff would have succeeded in recovering the more than $1,200,000 money and bonds

that plaintiff herein sent ACLI, without having to pay a lawyer and without becoming subject to any judgment against plaintiff herein.

81. CMP obtained for AGS in the action against plaintiff herein, a judgment in the sum of $1,519,898.59 plus costs, and a judgment against Braten in the sum of $631,106.14, in addition to over $1,200,000 AGS had already obtained from them.

82. Said judgment was obtained by CMP's said deceit.

83. Plaintiff herein moved to set aside said judgment against him.

84. Plaintiff herein paid over $100,000.00 for motions and appeals as to said judgment, and to defend other and further AGS proceedings based on said judgment.

85. Plaintiff herein moved after trial for a hearing in the action on the

question of whether AGS had a principal place of business outside of New York.

86. CMP thereupon presented a statement to the Court and to the parties in the action that AGS had its "sole office" in Chicago, Illinois, and only had two persons connected with it who at times operated from the office of AGS's "parent" in New York.

87. Said statement was false.

88. CMP knew AGS's office is in New York, when it presented said statement.

89. CMP knew when it presented said statement, that AGS had more than two persons connected with it, who operates from an office in New York.

90. CMP presented said statement with intent to deceive the Court.

91. CMP presented said statement with intent to deceive the parties defending the action, including the plaintiff herein.

92. CMP, by presenting said statement, deceived the Court.

93. CMP, by presenting said statement, deceived the parties in the action, including the plaintiff herein.

94. CMP, by presenting said statement, was guilty of a deceit.

95. CMP thereby induced the Court in the action against plaintiff herein, to deny the motion of plaintiff herein to vacate the judgment against plaintiff herein.

96. Plaintiff herein appealed to the Second Circuit Court of Appeals.

97. CMP argued on said appeal that the appeals court could consider only the record of the trial and the motion, including the false statements made by CMP as to the alleged "stipulation", and the false statements presented by CMP as to AGS having a "sole office" in Illinois, and as to how many people

operated for AGS in New York.

98. The Second Circuit Court of Appeals decided that on the record before it, the decision of the district court was "not clearly erroneous".

99. The said Court of Appeals did not decide any of the issues herein.

100. By all of the foregoing, CMP injured plaintiff herein.

101. By reason of all the foregoing, CMP has damaged plaintiff herein in the sum of at least $3,325,220.00 to the date hereof.

102. By reason of all of the foregoing, CMP has forfeited to the plaintiff herein, at least $9,975,660 to the date hereof, pursuant to the provisions of Section 487 of the New York Judiciary Law.

103. Plaintiff sues CMP for that sum in this civil action.

WHEREFORE, plaintiff herein demands

judgment against CMP, including both the defendant partnership and each of its partners, in the sum of $9,975,660.00, plus interest thereon from May 1, 1984, together with costs and disbursements of this action.

DANIEL RHOADES
Defendant Pro Se